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No. 79-306

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN MOTORS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 601 F. 2d 1329. The opinion and orders of the district court (Pet. App. 22a-32a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1979. The petition for a writ of certiorari was filed on August 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When Congress has prescribed a procedure by which objections to Commission subpoenas can be raised without risk in an enforcement hearing in the district court, and when the Commission has prescribed an

additional procedure under its rules by which objections to subpoenas can be raised prior to enforcement, whether subpoena recipients may bypass these procedures by filing a collateral action for preenforcement review.

STATEMENT

In August 1976 the Federal Trade Commission ("Commission") initiated an investigation into competition in the automobile industry. It adopted a resolution setting forth the purpose of the investigation and authorizing its staff to issue compulsory process (Pet. App. 37a). Pursuant to that resolution, the Commission's staff issued subpoenas duces tecum to petitioners General Motors Corporation, Chrysler Corporation, and American Motors Corporation, as well as Ford Motor Company. The petitioner manufacturers obtained extensions of time for complying with or moving to quash or limit the subpoenas until September 18, 1978, but neither complied with nor filed motions challenging the subpoenas within that time.[1] Rather, on September 11, 1978, they commenced this action seeking declaratory and injunctive relief, including relief enjoining the Commission from enforcing any compulsory process issued pursuant to its resolution.[2] Although the complaint

[1]The Commission previously issued a subpoena duces tecum to Chase Manhattan Corporation seeking records relating to petitioner American Motors Corporation's financial condition and ability to compete in the automobile industry. The date for compliance with, or filing motions addressed to, that subpoena was similarly extended by agreement.

[2]The three petitioner manufacturers were joined as plaintiffs by two General Motors dealers incorporated in Michigan. Ford Motor Company did not join in the action below. Instead, it filed a motion before the Commission seeking to quash or limit the subpoena pursuant to 16 C.F.R. 2.7(b). Its motion raised substantially the same claims raised by petitioners. The Commission's response to Ford's motion is described by the court of appeals (Pet. App. 20a-21a). See also note 5, *infra*.

contains a variety of allegations, its essential claim is that the resolution authorizing the investigation fails adequately to define the investigation's scope and purpose and that the subpoenas issued in the course of the investigation therefore constitute unreasonable searches and seizures in violation of petitioner's Fourth and Fifth Amendment rights (Pet. 12).

The Commission moved to dismiss the complaint, contending that petitioners failed to exhaust their administrative remedies by neglecting to file motions to quash or limit the subpoenas in accordance with the Commission's rules (see 16 C.F.R. 2.7(b)). The Commission also contended that because the subpoenas could be enforced only on application by the Commission to an appropriate district court (see 15 U.S.C. 49), petitioners had an adequate remedy at law and could raise their objections to the subpoenas as defenses in such an enforcement proceeding. The district court denied the Commission's motion to dismiss, and entered an order effectively enjoining the Commission from taking further steps to enforce the subpoenas (Pet. App. 22a-32a). The court of appeals reversed, ordering dismissal of petitioners' complaint. Declining to reach the merits of petitioners' claim, the court emphasized the narrow scope of its ruling (Pet. App. 3a):

> We emphasize that this court has not reached the merits of appellees' claims. This decision is based purely upon the conclusion that appellees have mistaken their remedies, and all issues (including appellees' constitutional claims) sought to be presented for decision to the District Court can and must under the law be presented first to the FTC and, if rejected, may then be litigated under the

applicable statutory provisions in subsequent enforcement proceedings in the Federal District Court prior to presentation to this Court.[3]

ARGUMENT

Petitioners' underlying claim (Pet. 12) is that, because of the breadth of the Commission's investigation, subpoenas issued in the course of the investigation amount to unreasonable searches and seizures in violation of their Fourth and Fifth Amendment rights. The court of appeals correctly declined to pass on the merits of that claim, holding that petitioners had "mistaken their remedies" (Pet. App. 3a) by filing a collateral action instead of moving in the administrative forum to quash the subpoenas and instead of availing themselves of the statutory procedure for objecting to Commission subpoenas in the district court at the time of enforcement.

[3]Although the court of appeals did not reach the merits of petitioners' claims, it noted that "[m]uch water has * * * flowed under many bridges" since this Court handed down its decision in the case on which petitioners placed principal reliance (*FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924) (a case which applies only to orders for unlimited access to files, not to investigations conducted pursuant to subpoena)). See Pet. App. 2a. It is generally recognized that *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), superseded the broad implications of *American Tobacco*. See 1 K. Davis, *Administrative Law Treatise* §3.01 at 163 (1958). Petitioners' argument that the issuance of administrative subpoenas gives rise to a "seizure" of their records (Pet. 26-27) is also at odds with *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195 (1946), which observed that administrative subpoenas "present no question of actual search and seizure, but * * * only the question whether orders of court for the production of specified records have been validly made * * *."

These administrative and judicial remedies are still available to petitioners and, as a result of the decision of the court of appeals, they are now pursuing them.[4]

1. The court of appeals' decision that petitioners must exhaust their administrative remedies rests on the established principle that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 211-214, 217 (1946); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). The rule requiring exhaustion of administrative remedies before commencing judicial proceedings applies to parties under investigation by the Federal Trade Commission. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653-654 (1950). Recent decisions have given effect to this doctrine by dismissing preenforcement challenges to Commission investigations. See, *e.g.*, *Casey* v. *FTC*, 578 F. 2d 793, 796-798 (9th Cir. 1978); *General Motors Corp.* v. *FTC*, [1978-1] CCH Trade Cases, para. 62,005 at 74, 291-74,294 (N.D. Ohio 1977).

The exhaustion doctrine was properly applied in the present case. Under Section 2.7(b) of the Commission's rules (16 C.F.R. 2.7(b)), petitioners may file motions with the Commission to quash or limit the subpoenas that they received based on all appropriate objections, including the Commission's purported lack of authority to conduct the investigation, the breadth of the subpoenas, and the

[4]Applications by petitioners for stay of the mandate of the court of appeals pending this Court's disposition of the petition for a writ of certiorari were denied by the court of appeals and by Mr. Justice Stewart sitting as Circuit Justice.

relevance of the information demanded. See, *e.g.*, *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 652; *FTC* v. *Texaco, Inc.*, 555 F. 2d 862, 871-873 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); *FTC* v. *Markin*, 391 F. Supp. 865, 869 (W.D. Mich. 1974), aff'd, 532 F. 2d 541 (6th Cir. 1976); *General Motors Corp.* v. *FTC*, *supra*, [1978-1] CCH Trade Cases at 74,294 n.9.

2. Petitioners nonetheless contend (Pet. 19-24) that the Commission's administrative procedures are inadequate. There is no question, however, that all of petitioners' claims may be raised in a motion to quash or limit, and that the Commission has power to grant the relief that they seek.[5] Their argument that the administrative procedure is inadequate rests on the assertion that their claims are based on the Constitution and that, in light of Commission policies and practices, they are not likely to obtain complete relief from the Commission.

Exhaustion is not excused, however, merely because constitutional contentions are raised. In most cases in which a recipient protests the scope of an administrative

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[5]As the Court of appeals noted (Pet. App. 20a), Ford Motor Company, which also was served with a subpoena during the course of the investigation, filed a motion to quash before the Commission. Even though Ford did not obtain from the Commission all the relief it sought, the court of appeals observed that resort to administrative remedies was justified:

> Contrary to convincing us that the administrative and statutory judicial remedies outlined above are inadequate, we feel the Ford result serves to illustrate and helps to justify the requirement of exhaustion of remedies. Plainly, the FTC did listen and act upon Ford's complaints. We have, of course, no way of judging the adequacy of its answer nor of knowing whether our present plaintiffs could present facts which would require a more favorable administrative remedy.

subpoena, it is possible to frame objections in constitutional terms. But framing the challenge in this manner does not dispense with the need for resort to administrative remedies. Indeed, in the leading case of *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, this Court required exhaustion of administrative remedies despite the existence of constitutional claims. The Court has required exhaustion even in cases in which the ultimate question raised (the constitutionality of the statute administered by the agency) was beyond the power of the agency to decide. *Weinberger* v. *Salfi*, 422 U.S. 749, 764-765 (1975).

Moreover, the availability of nonconstitutional grounds on which petitioners could obtain all or part of the relief that they seek makes exhaustion particularly appropriate. See, *e.g.*, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773-774 (1947); *Montana Chapter of Ass'n of Civilian Technicians, Inc.* v. *Young*, 514 F. 2d 1165, 1167-1168 (9th Cir. 1975); *Sohm* v. *Fowler*, 365 F. 2d 915, 918 (D.C. Cir. 1966); *Writers Guild of America, West, Inc.* v. *FCC*, 423 F. Supp. 1064, 1082-1083 n.21 (C.D. Cal. 1976). See also *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 56 (1974) (the doctrine of ripeness applies to constitutional claims). Petitioners' objections to the Commission's investigation could be resolved entirely on the basis of the alleged failure of the Commission to follow its own rules or to comply with the Federal Trade Commission Act. Alternatively, objections to overbreadth or relevance could be met through modification of the subpoenas. These questions should be presented to the Commission in the first instance and the Commission should be afforded an opportunity to make its determination.

Nor is exhaustion excused by petitioners' concerns that they are unlikely to obtain relief. This Court has held that exhaustion is required even if the agency has previously rejected the claim. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). It is sufficient to require exhaustion that there is a possibility that the agency may agree with the claim or, if disagreeing, may provide a definitive explication of its position that will facilitate judicial reivew.[6] As this Court observed in *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 653-654:

> If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

See also *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969).[7]

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[6]The Commission's expression of views on the propriety of conducting the investigation in the manner in question, and its analysis of its own organic statute and implementing regulations, will serve to assist ultimate judicial review. The agency's views on such questions are entitled to deference under familiar principles. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-10.

[7]The case of *Leedom* v. *Kyne*, 358 U.S. 184, 190-191 (1958), relied on by petitioners, is not in point. In that case, the district court was asked to resolve, on an undisputed factual record, whether the agency had contravened a specific statutory prohibition. The plaintiffs had "no other means" to "protect and enforce" their rights, and the administrative agency had already spoken on the issue raised. Similarly, in *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F. 2d 549 (2d Cir. 1978), the plaintiffs contended that the agency acted with a complete lack of statutory authority and that exhaustion would prevent them from meeting a statutory deadline. In excusing further resort to the agency, the court noted that it was dealing with "final agency action." *Id.* at 558-560. Moreover, the court reaffirmed the basic principles of exhaustion relied on by the lower court in the present case. *Id.* at 559.

3. Petitioners also contend (Pet. 24-32) that the court of appeals erred in concluding that they should pursue their judicial remedies in the district court in which the subpoenas will ultimately be enforced.[8] However, the court's ruling that petitioners have an adequate remedy in the subpoena enforcement proceeding is in agreement with the decisions of this Court and each of the other courts of appeals to have considered the issue. See *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *Casey* v. *FTC*, 578 F. 2d 793, 798-799 (9th Cir. 1978); *Atlantic Richfield Co.* v. *FTC*, 546 F. 2d 646, 649-650 (5th Cir.

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[8]Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, provides in pertinent part:

"[The] attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered; or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

1977); *First Nat. City Bank* v. *FTC*, 538 F. 2d 937, 938-939 (2d Cir. 1976), aff'g [1975-2] CCH Trade Cases. para. 60,671 (S.D.N.Y. 1975); *Anheuser-Busch, Inc.* v. *FTC*, 359 F. 2d 487, 490 (8th Cir. 1966); *Blue Ribbon Quality Meats, Inc.* v. *FTC*, 560 F. 2d 874 (8th Cir. 1977), aff'g 434 F. Supp. 159, 162 (W.D. Mo. 1976); *Beatrice Foods Co.* v. *FTC*, [1966] CCH Trade Cases, para. 71,733 (D.C. Cir. 1966). See also *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226 (1961); *Parke, Davis & Co.* v. *Califano*, 564 F. 2d 1200, 1205 (6th Cir. 1977); *Chilton Corp.* v. *FTC*, [1979-1] CCH Trade Cases, para 62, 487 (N.D. Tex. 1979); *Brandenfels* v. *Day*, 316 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963).[9]

The complete adequacy of the judicial enforcement proceeding to test the validity of the Commission's subpoenas is a compelling reason for declining to entertain petitioners' collateral suit seeking injunctive and declaratory relief. See, *e.g.*, *Casey* v. *FTC*, *supra*; *Atlantic Richfield Co.* v. *FTC*, *supra*, 546 F. 2d at 650; *Anheuser-Busch, Inc.* v. *FTC*, *supra*; see, generally, *Chrysler Corp.* v. *Schlesinger*, 565 F. 2d 1172, 1191-1192 (3d Cir. 1977), vacated on other grounds, No. 77-922 (Apr. 18, 1979). While requests for declaratory or injunctive relief are addressed to the sound discretion of the court (*Abbott*

[9]The Third Circuit decisions relied on by petitioners (Pet. 21, 26) are not to the contrary. *A.O. Smith Corp.* v. *FTC*, 530 F. 2d 515 (3d Cir. 1976), involved "special report" orders issued under Section 6(b) of the Act, 15 U.S.C. 46(b), not subpoenas. As noted by the court of appeals, such orders are quite different from subpoenas because they are enforceable by daily penalties (530 F. 2d 520 n. 2). See 15 U.S.C. 50. *Exxon Corp.* v. *FTC*, 588 F. 2d 895 (3d Cir. 1978), considered challenges to a protective order entered by an administrative law judge. The jurisdictional predicate for the limited form of judicial review permitted in that case was confined to the facts presented (588 F. 2d at 902).

Laboratories v. *Gardner*, 387 U.S. 136, 148 (1967)), such proceedings should not be used for "procedural fencing either to secure delay or to choose a forum." *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613, 617 (7th Cir. 1939). See also 6A *Moore's Federal Practice*, para. 57.08[3] at 57-42 (2d ed. 1979). As stated in the Administrative Procedure Act, 5 U.S.C. 703, the appropriate forum for judicial review "is the special statutory review proceeding relevant to the subject matter in a court specified by statute * * *." Accord, *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964) ("even though Rule 57 of the Federal Rules of Civil Procedure permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided"). In short, preenforcement actions such as this have traditionally been rejected because "the remedy specified by Congress works no injustice and suffers no constitutional invalidity [and] * * *provides full opportunity for judicial review before any coercive sanctions may be imposed." *Reisman* v. *Caplin*, *supra*, 375 U.S. at 450. Petitioners have "an adequate remedy at law through FTC enforcement actions and suffer[ ] no undue hardship in being remitted to that remedy." *Atlantic Richfield Co.* v. *FTC*, 546 F. 2d 646, 649 (5th Cir. 1977).[10]

[10]Because petitioners will suffer no prejudice from raising their claims in the context of an enforcement proceeding (*Anheuser-Busch, Inc.* v. *FTC*, *supra*, 359 F. 2d at 490-491), the court of appeals correctly held that petitioners could not demonstrate the immediacy of injury necessary to meet the test of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967) (Pet. App. 18a-19a). Moreover, there was no question that the action challenged in *Abbott Laboratories* was "final agency action." The only question in that case was whether petitioners could obtain review upon completion of that action or must obtain review only in a later action for penalties. Here, in contrast, there has been no "final agency action"; petitioners are subject to no penalties or other sanctions in advance of judicial subpoena enforcement proceedings.

4. The court of appeals properly rejected petitioners' attempt to avoid these settled principles by shifting their attack from the subpoenas to the Commission resolution authorizing issuance of the subpoenas (Pet. 26-32). Petitioners can show no injury from the adoption of a Commission resolution, an action which merely authorizes the Commission's staff to use the Commission's powers of compulsory process under Sections 6 and 9 of the Federal Trade Commission Act, 15 U.S.C. 46 and 49; see 16 C.F.R. 2.7(a). The alleged harms of which petitioners complain relate to the Commission's use of its subpoena power, not to the adoption of the resolution as such.

A resolution issued in a Commission investigation authorizes the staff to use compulsory process and provides the recipient of a subpoena with notice of the nature and scope of the investigation.[11] See *FTC* v. *Texaco, Inc.*, *supra*, 555 F. 2d at 873-874. But a resolution, without more, has no impact on anyone outside of the Commission. For this reason, the Commission's decision to commence an investigation does not constitute final agency action subject to judicial review. See *In re FTC Corporate Patterns Report Litigation*, 432 F. Supp. 291, 303 (D.D.C. 1977), aff'd, 595 F. 2d 685 (D.C. Cir.), cert. denied, No. 78-168 (Nov. 6, 1978); *Brandenfels* v. *Day*, 316 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963); see also *Gifford-Hill & Co.* v. *FTC*, 523 F. 2d 730, 732 (D.C. Cir. 1975).

Rather than being a final disposition of any aspect of the investigation, the adoption of a resolution is merely a preliminary procedural decision enabling the staff to commence the investigation. No fine, penalty, sanction or

[11]A copy of the resolution is typically attached to the subpoena, as was done in the present case.

other comparable legal consequence flows from the Commission's adoption of a resolution. See *Chicago & S. Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 112-113 (1948): "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Cf. *Southern Ry. Co.* v. *Seaboard Allied Milling Co.*, No. 78-575 (June 11, 1979). While petitioners assert potential injury flowing from the possibility of disclosure of confidential information and other similar acts, such disclosures would be separate administrative actions whose legality could be tested in independent proceedings (see, *e.g.*, *Exxon Corp.* v. *FTC*, 588 F. 2d 895 (3d Cir. 1978); *Exxon Corp.* v. *FTC*, 589 F. 2d 582 (D.C. Cir. 1978)).[12] Moreover, the issuance of subpoenas pursuant to the Commission's resolution does not subject petitioners to sanctions for noncompliance because Commission subpoenas are not self-enforcing. See 15 U.S.C. 49; *Anheuser-Busch, Inc.* v. *FTC*, *supra*, 359 F. 2d at 490.

In sum, the complaint is barren of any allegation of injury that flows from the mere adoption of the Commission's resolution.

[12]Petitioners do not contend that disclosures by the Commission are the "final agency action" on which the present suit is based.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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